

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

FILMED

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 72443-41A BY WILLIAM C.)
HEPPENHEIMER)

* * * * *

The Hearing Examiner's Proposal for Decision (hereafter Proposal) in the above-captioned matter was entered on May 25, 1990. The Proposal recommended that Application for Beneficial Water Use Permit No. 72443-41A be denied. The Hearing Examiner found that the Applicant had not shown that there are unappropriated waters in the source of supply in the amount requested at times when the water can be put to the beneficial use contemplated.

Objectors Tony and Donna Demetriades (hereafter Demetriades or Objectors) through counsel, filed timely exceptions to the Proposal arguing that certain Findings of Fact and Conclusions of Law were not borne out by the evidence. The administrative rules that govern these proceedings provide that any party adversely affected by the Proposal for Decision may file exceptions. Mont. Admin. R. 36.12.229(1989). Since the Hearing Examiner's decision proposed that the application be denied, Objectors are not adversely affected by the Proposal. However, the exceptions raise issues regarding Objectors' interests which are included in the Findings of Fact and Conclusions of Law. Therefore, although not required, the Department of Natural Resources and Conservation responds to Objectors' exceptions.

CASE # 72443

Having given the exceptions full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal, and incorporates them herein by reference.

Demetriades take exception to Conclusion of Law 8 stating that at no time during the hearing did Demetriades state the effect upon his property and/or rights would be imperceptible. Objectors further stated that if the Applicant had been granted a permit Demetriades would be obligated to have his point of diversion open and allow water to flow through his land in places and at times not of his choosing. They contend that when water is flowing through the ditch at times not of the Objectors' choosing, there are hazards to the Demetriades' property, operations, business and welfare.

As prior appropriators, Objectors control the water in the ditch. They control when the water enters the ditch and the length of time it is allowed to flow through the ditch. Granting the Applicant a permit would not have altered that fact. It was on this point the Hearing Examiner determined the Applicant failed to meet the requisites of § 85-2-311(1)(a), MCA. Because Objectors have the right to control the time, amount and duration of the flow in the channel, Applicant could not prove there was water available at times when it could be put to the use proposed, in the amount proposed, during the proposed period of appropriation.

The possible hazards to Objectors' property, operations, business, and welfare are property rights. The issue of property rights other than water rights is not within the jurisdiction of the Department. See In the Matter of Application for Beneficial Water Use Permit No. 5266-410 by Farmers Co-op Canal Company, Proposal for Decision, May 5, 1976 at page 26. See also In the Matter of Application for Beneficial Water Use Permit No. 65739-76H by John D. and Victoria L. Greathouse, Proposal for Decision, October 10, 1989 at page 5. Conclusion of Law 8 is not erroneous.

Objectors take exception to Conclusion of Law 5 which held the proposed means of diversion, construction, and operation of the appropriation works were adequate.

The proposed diversion, construction, and operation of the proposed project was adequate as described in Finding of Fact 6. Objectors do not challenge that finding; the basis for this exception was the lack of ditch rights.

Whether an applicant holds a ditch right or other easement necessary for carriage of the water sought to be appropriated is not an issue which requires resolution in order to make a determination of whether the criteria for issuance of a permit have been met. Ditch rights and water rights are wholly separate and distinct. A grant by the Department of a permit to appropriate water does not in any way carry with it or imply the grant of a ditch right. Ditch rights must be acquired separately. See In the Matter of Application for Beneficial

Water Use Permit No. 55390-s76H by Heather J. Grayson, Proposal for Decision, January 24, 1986 at page 13. See also In the Matter of Application for Beneficial Water Use Permit No. 56738-s76M by Brookside Estates, Inc., Proposal for Decision, May 9, 1986 at page 20. Conclusion of Law 5 is not erroneous.

Demetriades object to Conclusion of Law 7 which held that the Applicant had met the criterion of § 85-2-311(1)(e), MCA, that the proposed use will not interfere unreasonably with other planned uses or developments for which water has been reserved. Objectors contend a permit would have unreasonably interfered with their planned uses for stock water and irrigation and is contrary to their rights as "owners of the appropriation (W49525) granted to them by the State of Montana."

Section 85-2-311(1)(e) is intended to protect owners of beneficial water use permits who have not completed the proposed project and to protect entities which have been granted a water reservation by the Board of Natural Resources and Conservation. Demetriades do not have a water reservation because individuals cannot be granted a reservation of water, § 85-2-316, MCA, and Objectors do not have a beneficial water use permit issued by the Department of Natural Resources and Conservation.

Demetriades have Statement of Claim of Existing Water Rights No. W49525 filed with the Water Court claiming stock water from a ditch. A Statement of Claim is exactly what its name implies. It is a claim filed with the Water Court stating that a specified amount of water was used for a certain purpose prior to July 1,

1973. A Statement of Claim is prima facie evidence of past use, not of planned uses. Mont. Code Ann. § 85-2-211, et seq. (1989). Conclusion of Law 7 is not erroneous.

WHEREFORE, based upon the record herein, the Department makes the following:

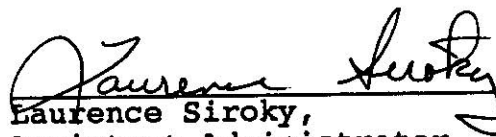
ORDER

Application for Beneficial Water Use Permit No. 72443-41A is hereby denied.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 9 day of November, 1990.


Laurence Siroky,
Assistant Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 9th day of November, 1990 as follows:

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Cindy G. Campbell
Hearings Unit Secretary

131ue

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF APPLICATION)	
FOR BENEFICIAL WATER USE)	PROPOSAL FOR DECISION
PERMIT NO. 72443-41A BY)	
WILLIAM C. HEPPENHEIMER)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on April 25, 1990 in Dillon, Montana.

Applicant William C. Heppenheimer appeared pro se and by and through counsel, Leonard A. Schulz.

Objectors Anthony and Donna L. Demetriades appeared pro se and by and through counsel, Terry Schaplow.

Objector Water Users Irrigation Company appeared by and through counsel, W. G. Gilbert, Jr.

Objector Evan Huntsman appeared pro se and by and through counsel, W. G. Gilbert, Jr.

Objector Florence Huntsman appeared by and through counsel, W. G. Gilbert, Jr.

Tom Breneman, General Contractor, appeared as a witness for the Applicant.

Patrick McKenna, Chief of the Lakeview Volunteer Fire Department, appeared as a witness for the Applicant.

Gerald L. Westesen, Professor of Civil and Agricultural Engineering with Montana State University, appeared as a witness for Objectors Demetriades.

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Richard Gosman, Vice-president of the Water Users Irrigation Company, appeared as a witness for Objector Water Users Irrigation Company.

Allen Martinell, President of the Water Users Irrigation Company, appeared as a witness for Objector Water Users Irrigation Company, hereafter, Irrigation Company.

Gregory Van Voast, Water Rights Specialist in the Helena Field Office of the Department of Natural Resources and Conservation, hereafter Department, appeared at the hearing.

EXHIBITS

Applicant's Exhibit 1 was a microfilm copy of one of Objectors' Water Right Claims for stockwater. Objectors Demetriades objected to the entry of this exhibit into the record because the Demetriades' water right was not the issue at this hearing. Applicant intended to show the Water Right Claim was questionable. The Department must accept a water right claim as prima facie evidence of an existing water right. § 85-2-227, MCA. Objection sustained.

Applicant's Exhibit 2 is a white poster board approximately 22 inches by 28 inches. A scaled map representing Applicant's property, showing the location of the proposed source, ditch, pipeline, and pond has been hand-drawn on this poster board. There are seven photographs affixed to the board. The photographs are identified by letters, "A" through "D", except the photograph of the house. Photograph "A" depicts a view looking south into Hell Roaring Canyon. Photograph "B" depicts a

view from the northwest corner of Applicant's property. "C" is made up of three photographs showing a panoramic view of the proposed pond site marked by black ink on the third photograph, the house on the first, and the property between the house and the proposed pond site on the second photograph. The fourth photograph, "D" depicts a view to the west along the boundary between the Applicant's and Objectors Demetriades' property. Objectors Demetriades objected to the entry of this exhibit because the map is inaccurate and that a proper foundation had not been laid for the entry of this exhibit. Applicant must be allowed to present his case. Objection overruled.

Applicant's Exhibit 3 is a copy of a Certified Corner Recordation for the common corner of Lots 4, 5, 6, and 7 as determined by Henry A. Rate, Registered Surveyor. This document was filed in the Beaverhead County Courthouse on August 29, 1985. Objectors Demetriades objected to the entry of this exhibit into the record on the basis that the hand-drawn map on the document is inaccurate. Objection overruled. The document was to certify the corner location, not the location of the stream.

Applicant's Exhibit 4 is a photocopy of an aerial photograph; the original can be seen at the Beaverhead County Agriculture Stabilization and Conservation Service (ASCS) in Dillon, Montana. This photograph copy shows ownership boundary lines which have been drawn on the original photograph by the ASCS personnel as a routine part of their work. Objectors Demetriades objected to the entry of this copy into the record

and to testimony of the witness using the term "braidations" when referring to the copy. Again, Applicant must be allowed to present his case. Objection overruled.

Applicant's Exhibit 5 is a poster board of the same dimensions as Applicant's Exhibit 2. Ten photographs have been affixed to this board. Each photograph has an explanation written below it. Objectors Demetriades objected to the entry of this exhibit into the record because it misrepresents the channel and the true use thereof. The Applicant must be allowed to present his case. Objection overruled.

Objectors Demetriades' Exhibit A is a resume' of Gerald L. Westesen's career, accomplishments, and qualifications. This exhibit was entered into the record without objections.

Objectors Demetriades' Exhibit B, hereafter Exhibit B, is a white poster board measuring approximately 22 inches by 28 inches. There is a map of parts of Sections 23, 24, 25, and 26, Township 14 South, Range 1 East, Beaverhead County, traced on this board. Objector Anthony Demetriades traced the map from an original photograph onto vellum then transferred the tracing to the poster board. This map depicts the boundaries of Government Lots, 5, 6, 7, 8, and 9, the location of Hell Roaring Creek, the county road, Objector Demetriades' property, including the grazing lease, and the Applicant's property. There is an error on this map; it indicates two different areas as Government Lot 8. The area to the west of Lot 4 is not a government lot. According to the Government Land Survey of Township 14 North,

Range 1 East; this area is a 40 acre parcel and can be described as the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 24, Township 14 North, Range 1 East. This exhibit was accepted into the record without objections.

Objectors Demetriades' Exhibit C is an enlarged copy of an aerial photograph of Lots 3, 4, 5, 6, 7, 8, and 9 of Section 24 and the northern part of Section 25, both in Township 14 North, Range 1 East. Mr. Demetriades received the smaller copy from the Applicant and had it enlarged. The map is mounted on a white poster board the same size as Exhibit B. This exhibit was accepted into the record without objections.

Objectors Demetriades' Exhibit D is a hand-written letter from the Applicant to Objector Anthony Demetriades. The letter is encased in a clear plastic cover. One phrase has been circled with red ink on the covering. Also in this covering is a photocopy of an aerial photograph with the corner of Lot 7 and the surrounding area circled in red ink and a remark that the creek does not flow through Lot 7. This exhibit was accepted into the record without objections.

Objectors Demetriades' Exhibit E is a hand-written letter from the Applicant to Objector Anthony Demetriades. The letter is encased in a clear plastic cover. One phrase has been circled with red ink on the covering. Also in this covering is a copy of map with Applicant's property cross-hatched in blue ink. There is a red circle on the covering with a remark that the creek does not go through Lot 7. There is also a remark in blue ink stating that Lot 7 was to be purchased from Dr. Schaeffer. There is

another remark in red ink that the blue ink is Applicant's handwriting. This exhibit was accepted into the record without objections.

Objectors Demetriades' Exhibit F is a poster board the same size as Exhibit B and has Lots 4, 5, 6, and 7 drawn on it. Ditches are shown by blue dashes and diversions are shown by blue circles. Applicant objected to the entry of this Exhibit into the record because Mr. Demetriades had prepared the map. Mr. Demetriades stated he had traced the map on vellum, then transferred the tracing to the poster board. Objection overruled.

Objectors Demetriades' Exhibit G is a white poster board the same size as Exhibit B. There are five photographs affixed to the board, one measures approximately three and one half inches by five inches and the other four have been enlarged to eight inches by ten inches. The four large photographs have explanations written on the board identifying each picture. The small photograph is of two persons digging in a waterway. This exhibit was accepted into the record without objection.

Objectors Demetriades' Exhibit H is a white poster board the same size as Exhibit B. There are four eight by ten photographs attached to the board with explanations of each written on the board. This exhibit was accepted into the record without objections.

Objector Irrigation Company did not offer any exhibits for the record.

Objectors Evan and Florence Huntsman offered no exhibits for the record.

The Department's file was reviewed by all parties and was received into the record in its entirety without objection.

FINDINGS OF FACT

1. Section 85-2-302, MCA, states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in § 85-2-306, MCA, do not apply in the present matter.

2. William C. Heppenheimer filed the above-entitled Application with the Department on August 21, 1989 at 11:00 a.m.

3. Pertinent portions of the Application were published in the Dillon Tribune, a newspaper of general circulation in the area of the source, on October 10, 1989.

4. Applicant purchased Lot 7 of Section 24, Township 14 South, Range 1 East from Dr. Schaefer in 1985. (Testimony of Applicant)

5. The original Application was to divert water from Hell Roaring Creek at a point in the NW¼SE¼SW¼ of Section 24, Township 14 North, Range 1 East, in Beaverhead County to be used for fire protection from May 1 to November 1, inclusive of each year. The water was to be stored in a reservoir with a capacity of 1.2

acre-feet. During the processing of this Application, the Applicant was contacted by the Department and the Application was amended to appropriate water from January 1 through December 31, inclusive of each year. The proposed use was changed to include a flow-through fish pond and the amount of water appropriated would be one cubic foot per second up to 723.9 acre-feet of water per year to flow through the fish pond. The Application was published as changed. After the public notice period, the Department received four objections to this Application.

On November 17, 1989, the Department received a letter from Leonard A. Schulz, Attorney for the Applicant, modifying the Application in response to the objections. The modification included reduction of the surface area of the pond from .3 of an acre to .08 of an acre, reduction of the flow rate from one cubic foot per second to one half cubic foot per second, and changing the period of appropriation back to the original intent, from May 1 to November 1. The method of returning the water to the source would be changed from an open ditch to a six inch plastic pipe to reduce the possibility of water loss by evaporation and seepage. It is not clear whether the pit size would be reduced as well as the amount of water to be appropriated. If the pond would be ten feet deep and the surface area .08 of an acre, the pond size would be .32 of an acre-foot. The amount of water to be diverted, nonconsumptively, through the proposed pond would be 183.46 acre-feet per year. With the estimated consumptive use of .32 of an acre-foot per year and an estimated 600 gallons per day

lost to evaporation, the total consumptive use would be .65 of an acre-foot per year.

Early in the hearing process, Applicant reiterated the modifications and stated the pond would not be used for fish, that a fire pond was his intention from the beginning. He stated that a fish pond would have been nice, but fire protection was his original intent. (Department file and testimony of Applicant.)

6. The proposed diversion would be a Waterman headgate into a ditch with a one-half inch to 100 feet rate of fall. The water would flow down the ditch into a pond then into a six inch pipe which would carry it back to the source. The intake ditch, where the soil is porous, and the pond would be lined with 8 mil polyfilm to prevent water loss by seepage. A floating self-priming, gasoline powered fire pump connected to a hose would be installed in the proposed pond. The rate of water pumped from the pond would be about 50 gallons per minute at a pressure sufficient to use for fire fighting. A flow-through pond was considered necessary to keep the pit full at all times. Without the flow-through water, some method would be needed to open the gate when the pond needed filling. Mr. Breneman testified that he knew of no such method that would be feasible for this project. (Testimony of Tom Breneman and Department file.)

7. Because the Centennial Valley is so sparsely populated and the distance to each domicile from Lakeview is so great, the Lakeview Fire Department encourages all home owners in the

Centennial Valley to install fire protection ponds. (Testimony of Patrick McKenna.)

The Applicant testified that in 1988, when the sparks from the fires in Yellowstone Park were falling in the Centennial Valley, "it was pretty scary" and that's when he decided to install a fire protection pit.

8. There are several water sources available to the Fire Department for emergency fire fighting. Water is available from Hell Roaring Creek, which is approximately 30 feet outside the Applicant's property line at the northwest corner. Objectors Huntsman's ponds, Objectors Demetriades' ditches, and the channel in question, if it has water in it. There is also a possibility of using the Applicant's domestic well although if a fire burns into the electrical wiring, that would render the well inoperable. (Objectors Demetriades' Exhibit E and testimony of Anthony Demetriades, Evan Huntsman, and Patrick McKenna.)

9. The Applicant contends the channel flowing across the northwest corner of his property, hereafter subject channel, is a part of Hell Roaring Creek. Witnesses Breneman and McKenna testified they had fished in that part of the stream until Objectors Demetriades purchased the land surrounding Government Lot 7 of Section 24, Township 14 South, Range 1 East, limiting access to Lot 7.

10. According to USGS Quadrangle maps, Mount Jefferson and Sawtell Peak, Montana-Idaho, Hell Roaring Creek is a perennial stream which originates in the Eastern Centennial Mountains at an

elevation of about 9,000 feet. It flows in a northwesterly direction for approximately seven miles, dropping to an elevation of approximately 6,400 feet at Objectors Demetriades' claimed diversion. The Mount Jefferson Quadrangle, Provisional Edition 1988, does not show Hell Roaring Creek flowing through Government Lot 7 of Section 24, Township 14 South, Range 1 East. On this map, Hell Roaring Creek flows through Government Lot 6, across the southeast corner of Government Lot 5, then north through the northern border of Government Lot 4, all in said Section 24. After Hell Roaring Creek leaves Lot 4, it flows northwesterly for approximately a mile and a half, then into Red Rock Creek.

11. Objectors' Demetriades have filed Statements of Claim of Existing Water Rights No. W49525-41A, W94610-41A, W101031-41A, and W101032-41A, claiming water use from Hell Roaring Creek. Objectors Demetriades contend the subject channel is their irrigation ditch; that the mound of dirt and rocks visible in the lower left hand corner of Objectors Demetriades' Exhibit G is a man-made dam to divert the water of Hell Roaring Creek into the ditch. A review of the aforementioned Water Right Claims show no claim for irrigation from the subject channel. Water Right Claim No. 49525 is a claim for stockwater use from a ditch. (Department records and testimony of Anthony Demetriades and Gerald Westesen.)

12. There are no headgates on the subject channel that Objectors Demetriades claims is their irrigation ditch. The method of control is a "canvas" dam placed at the confluence of Hell Roaring Creek and the channel. The dam is not actually

canvas; it consists of a poly material that is fastened to a board long enough to span the channel. After the dam is placed in the proper position, it is weighted down by rocks and steel fence posts. When the dam is in place, little or no water can go down the channel. When the dam is removed, water is allowed to flow down the channel to irrigate approximately 15 acres. This type of irrigation system is common in the high mountains of Montana. If Applicant is allowed to divert water from the subject channel, Objectors Demetriades will not be able to control the water as he has in the past and his property may be damaged if the water is allowed to flood and freeze, forming a temporary icecap. (Objectors Demetriades' Exhibit H and testimony of Anthony Demetriades and Gerald Westesen.)

13. At the request of both the Applicant and Objectors Demetriades, the Hearing Examiner conducted an on-site visit on May 4, 1990. During that visit, the Examiner viewed the subject channel which the Applicant maintains is a branch of Hell Roaring Creek and which Objectors Demetriades contend is their irrigation ditch. The subject channel is approximately three feet wide and approximately 12 to 15 inches deep. There was wet soil in the bottom of the smaller channel. At the mouth of the subject channel, there is a mound of soil and rocks separating the subject channel from the larger waterway. The Hell Roaring Creek bed, which is 15 to 20 feet wide at this point, consists of rocks scoured clean by the water force. A "canvas" dam had been placed across the subject channel so that little or no water was allowed

to flow down the channel. The subject channel roughly follows the contour of the land and at one point, there is a lateral channel leading to an area beyond a slight rise. The subject channel continues in a northeasterly direction through the corner of the Applicant's property, then back onto Objectors Demetriades' property where it has been used to irrigate approximately 15 acres of native pasture. There were some damaged areas where the water had been allowed to flow over the ground and form a temporary icecap.

14. The Irrigation Company, in its objection, expressed the concern that there would be a transit loss of water by percolation, transpiration and evaporation while flowing through the diversion ditch, while in the pond and through the outlet ditch. Mr. Gosman testified the project as modified the last time, would have a minor effect on the Irrigation Company's prior water right. Allen Martinell testified that the Red Rock Creek basin was over-appropriated and that any new water use would have an adverse effect. Not just this particular water use, but the cumulative amount if new uses continue to be permitted. The Irrigation Company's diversion is approximately 26 miles downstream from the Applicants proposed project. (Department file, testimony of Richard Gosman and Allen Martinell and opening statement by Applicant's counsel.

15. Evan and Florence Huntsman's objection is based on the probable loss of water to seepage. There is another reservoir in the source area that has water flowing into it, but little or no

water flows out, apparently because the soil is very rocky and porous. Objector Evan Huntsman testified that he would have no objection if the Applicant could guarantee that there would be a total loss of only 600 gallons of water per day. (Testimony of Evan Huntsman and Department file.)

16. Several objectors testified the Red Rock basin was overappropriated and no waters are available for appropriation. Applicant offered no testimony or evidence to controvert these allegations.

17. The Montana Department of Fish, Wildlife and Parks, hereafter MDFWP, filed an objection to this Application stating that MDFWP has applied for an instream flow reservation in Hell Roaring Creek to protect the stream's fish and wildlife resources. If this reservation is granted, MDFWP's priority date will be July 1, 1985, unless the reservation is subordinated to this Application. Applicant and MDFWP reached an agreement prior to the hearing and MDFWP withdrew its objection. (Department file.)

18. Department records reveal no other planned uses or developments for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or

rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein and the parties hereto.

3. The Department must issue a Beneficial Water use Permit if the Applicant proves by substantial credible evidence that the following criteria set forth in § 85-2-311(1) are met:

(a) there are unappropriated waters in the source of supply at the proposed point of diversion:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) during the period in which the applicant seeks to appropriate, the amount requested is reasonably available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved; and

(f) the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

4. The proposed use of water, fire protection, is a beneficial use. See § 85-2-102(a), MCA.

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 5 and 6.

6. The Applicant has possessory interest in the proposed place of use. See Finding of Fact 4.

7. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved. See Finding of Fact 16.

The Missouri River system presently is involved in a water reservation process. If such a reservation were to be granted by the Board of Natural Resources and Conservation, that reservation, with a priority date of 1985, would be senior to the instant Application which has a 1989 priority date. See Finding of Fact 2 and 16.

8. The proposed project will not affect prior water rights to a great degree. By virtue of low consumption of water and the distance from other appropriations and as stated by objectors, the effects of Applicant's appropriation would be imperceptible. See Finding of Fact 5, 14, and 15. There being no allegations of adverse effect on the record, and no adverse effect to prior appropriators based on the record, it is concluded that § 85-2-311(b), MCA, is met.

9. A Permit is not necessary before using water for fire protection from an existing source. An emergency situation, such as a fire, clearly enables an appropriator to make a temporary appropriation. Administrative Rule of Montana 36.12.105 states, in relevant part:

(1) A temporary emergency appropriation may be made without prior approval from the department, but the use must cease

immediately when the water is no longer required to meet the emergency....

A fire emergency does not necessarily mean there is actually a fire. When burning embers are threatening to ignite a property, as occurred in 1988, that is an emergency and cause to appropriate water to wet down buildings and surrounding areas to prevent an actual fire. See Finding of Fact 7.

There are other water sources available for emergency fire protection. Hell Roaring Creek, which is approximately 30 feet outside the Applicant's property line at the northwest corner, the ponds and ditches on other neighboring properties, and the Applicant's domestic well. See Findings of Fact 7 and 8.

10. Objectors Demetriades have the right to control the water in the subject channel to exercise their stockwater right and to protect their property from damage by flood waters. See Findings of Fact 11, 12, and 13.

11. Applicant has not proven by substantial credible evidence that there are unappropriated waters in the source of supply in the amount requested at times when the water can be put to the beneficial use contemplated. He has therefore failed to meet the criteria set forth in § 85-2-311(1)(a), MCA. See Finding of Fact 16.

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

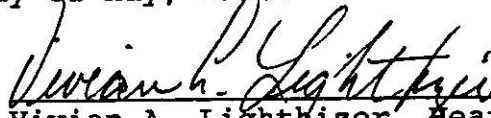
Application for Beneficial Water Use Permit No. 72443-s41A is hereby denied.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served on all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of timely exceptions, responses, and briefs.

Dated this 25th day of May, 1990.


Vivian A. Lighthizer, Hearing Examiner
Department of Natural Resources and
Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, at their address or addresses this 25th day of May, 1990, as follows:

William C. Heppenheimer
P.O. Box 1057
East Hampton, NY 11937

Liter Spence
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